SUPREME COURT, U. S.

In the Supreme Court of the United States

OCTOBER TERM, 19[illegible]

No. 825

ANGHEL GOLDSTEIN, also Arshel Pinkus,
IULIU NASTA, also Julius Nasta and
GEORGE FUNDI,
on behalf of themselves and all others similarly situated,
Petitioners,

vs.

JOSEPH A. COX and SAMUEL DeFALCO,
Surrogates of the County of New York,
EDWARD S. SILVER,
Surrogate of the County of Kings,
CHRISTOPHER C. McGRATH,
Surrogate of the County of Bronx,
JOHN T. CLANCY,
Surrogate of the County of Queens,
ARTHUR LEVITT, State Comptroller,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Second Circuit

[illegible]
[illegible]
[illegible]
Counsel for Petitioners

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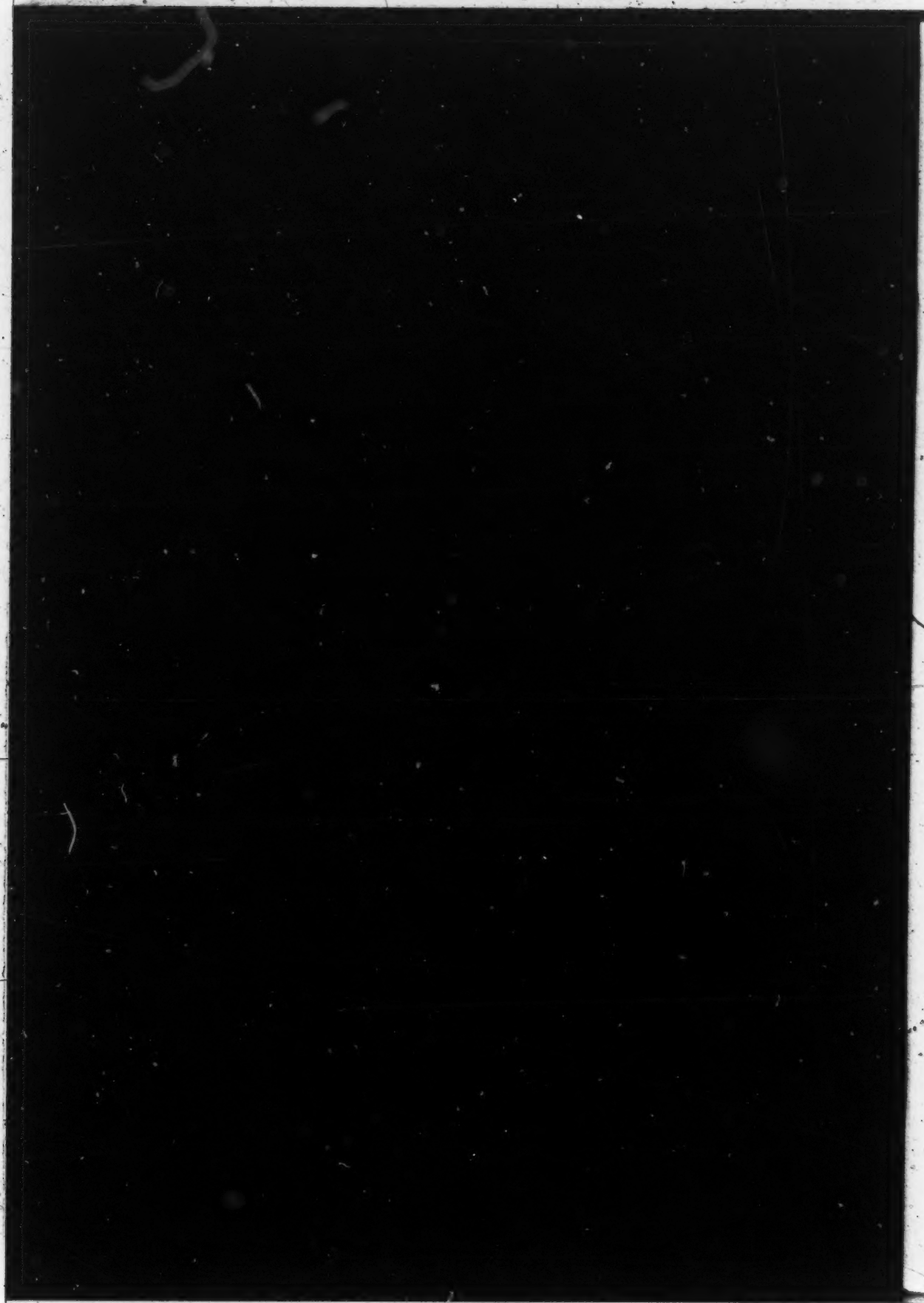
Of Counsel



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OPINIONS BELOW.

The memorandum opinion of the District Court is unreported and is printed in Appendix B hereto, *infra*, p. 9. The Court of Appeals did not render an opinion.

JURISDICTION.

The judgment of the Court of Appeals was entered on September 27, 1965, p. 13, *infra*, Appendix B. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

QUESTION PRESENTED.

Whether the constitutional claims of petitioners' complaint are substantial, and, therefore, require determination by a three judge court.

STATUTE INVOLVED.

The statutory provisions involved are Section 269-a of the New York Surrogate's Act, and 28 U. S. C., Section 2281. They are printed in Appendix A, *infra*, pp. 8-9.

STATEMENT.

The complaint was filed in the U. S. District Court for the Southern District of New York, by citizens of Romania, as a class suit pursuant to Rule 23(a) of the Federal Rules of Civil Procedure, against officials of the State of New York. The jurisdiction of that court was invoked under Title 28, U. S. C., Section 1331 and also under Title 28 U. S. C., Section 2281. (Complaint appended hereto in Appendix C, *infra*, p. 13.)

The principal action challenges the constitutionality of the Surrogate's Court Act of New York, Section 269-a and the policy and practice predicated on such act insofar as the rights of nationals and residents of Romania are involved.

The policy of the State of New York, which petitioners challenge as unconstitutional, is accurately set forth by the respondent Surrogate of King's County in his letter of October 15, 1965, in reply to a request addressed to him by an heir in Romania for the release and immediate payment of his distributive share in the modest amount of $2,989.63, Reply Affidavit of John R. Vintilla, paragraph 13 (R. 62).[1] The pertinent portion of said respondent's letter reads as follows:

> "I have given serious consideration to your letter of August 28, 1965, in which you request the release of your distributive share in the above estate. It is the public policy of the State of New York to withhold distribution to legatees who would not have the benefit or use or control of their bequest. The Appellate Courts of this State have held that residents of Rumania are within this description. As a Judge of the Surrogate's Court I am bound by the ruling of the higher court, and as an individual I am in full

[1] References to record in Court of Appeals.

agreement with it. Accordingly, and despite my personal desire to help you because of your advanced age, physical infirmity and need for the money, I must advise you that if formal application for the payment of your bequest in full is made to me, I would be constrained to deny the same."

A recent affirmation of this policy is to be found in the Surrogate's decision in *In re Greenberg*, 46 Misc. 2d 883, 261 N. Y. S. 2d 176 (Surr. Ct. 1964), aff'd 24 App. Div. 2d 435 (1st Department, 1965), *leave to appeal denied*, 17 N. Y. 2d 417 (December 30, 1965).

The petitioners, as victims of such policy and practice, seek to convene a special tribunal of three judges to pass on the constitutionality of Section 269-a of the New York Surrogate's Court Act as applied to their rights and that of others similarly situated, and to enjoin the respondents, each of whom is either a Surrogate or officer of the State of New York, from applying and enforcing the policy complained of.

The District Court found that a substantial federal question is presented by the complaint, but refused to refer the controversy to a special three judge court on authority of *Swift & Co. v. Wickham*, 382 U. S. 111 (1965). The Court of Appeals affirmed the decision of the District Court on the same authority. It is from this decision and order that the present appeal is taken.

REASON FOR GRANTING THE WRIT.

1. The court below misapprehended the decision in *Swift v. Wickham*, 382 U. S. 111, as it applies to the constitutional challenges of the petitioners' complaint, and its decision is in direct conflict with the spirit and purpose of Section 2281 of Title 28, United States Code.

The gravamen of petitioners' Complaint is that the policy of New York, predicated upon said statute, violates important provisions of the Federal Constitution. This state statute is assailed by the Petitioners as being repugnant to the Federal Constitution in several respects, to wit: First, it violates the due process and equal protection clauses of the Federal Constitution. Secondly, it is in direct conflict with and in violation of superior federal policy based upon the Financial Agreement of March 30, 1960, between our government and that of Romania, by virtue of which, Romania paid in excess of twenty-four million dollars in satisfaction of various claims of Americans as a result of the nationalization of their properties in Romania. In consideration thereof, the United States agreed to and did release all blocking controls over property of Romanian nationals in the United States such as distributive shares from decedents' estates which were being held by the Office of Alien Property, and other funds and properties. In addition, the United States resumed the transmittal of Social Security benefits, Veteran's pensions and other funds due and owing to residents in Romania. Thirdly, the application of Section 269-a in withholding distribution to residents of Romania encroaches upon and interferes with the exclusive power of the Federal Government in the area of international relations as provided by Art. I, Section 10, of the U. S. Constitution.

Admittedly, the requirement of a three-judge tribunal does not become operative if the constitutional claims alleged in the complaint are too insubstantial. The constitutional challenges in our case, we believe, are substantial. Significantly, the District Judge found that there is a "possible conflict between the New York Statute and the new federal policy vis-a-vis Romania," and that such conflict presents "a question which has not been set at rest" by earlier decisions of this Court.

The Congressional purpose in the enactment of Section 2281 was to safeguard important state interests by "requiring the collective judgment of three judges and accelerating appeals to this Court," 382 U. S. 127, whenever the constitutionality of a state law is questioned.

In *United States v. Georgia Public Service Commission*, 371 U. S. 285, 287, this Court declared:

> "We have presented here more than an isolated issue whether a state law conflicts with a federal statute and therefore must give away by reason of the Supremacy Clause. Direct conflict between a state law and federal constitutional provisions raises, of course, a question under the Supremacy Clause but one of a broader scope than where the alleged conflict is only between a state statute and a federal statute that might be resolved by the construction given either the state or the federal law."

We submit that the foregoing declaration is applicable equally to the instant complaint.

That the action of the Federal Government in concluding the Financial Agreement of 1960 with Romania constitutes new foreign policy with relation to that country is clear. Due to the domestic policy of New York in withholding funds belonging to nationals and residents of Romania, the implication is that the United States, because of this restrictive action by the State of New York,

is not fulfilling its international obligations under the Executive Agreement of 1960.

Once again, the issue is clear. For "state law must yield when it is inconsistent with, or impairs the policy or provisions of a treaty or *of an international compact or agreement.*" *United States v. Pink*, 315 U. S. 203, 231 (1942); *Kolovrat v. Oregon*, 366 U. S. 187 (1961). (Italics ours.)

As the Court also stated in *Pink*, page 233:

> "No state can rewrite our foreign policy to conform to its own domestic policies. Power over external affairs is not shared by the State; it is vested in the national government exclusively * * *."

The validity of the New York statute and policy, in the light of the applicable international and constitutional law, is examined and reviewed exhaustively by Professor Boyd in his article entitled

> "The Invalidity of State Statutes Governing the Shares of Nonresident Aliens in Decedents' Estates," which appeared in Volume 51, the *Georgetown Law Journal*, page 450 (1963).

We believe that the instant case asserts a direct conflict with the Federal Constitution, and involves federal issues which are substantial and unsettled. It, therefore, follows that a three-judge court is required to decide this controversy.

CONCLUSION.

For the foregoing reason, this petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN R. VINTILLA,
Counsel for Petitioners.

APPENDIX A.

STATUTES.

Section 269-a provides as follows:

"*Deposit in court for benefit of legatee, distributee or beneficiary.* 1. Where it shall appear that a legatee, distributee or beneficiary of a trust would not have the benefit or use or control of the money of other property due him, or where other special circumstances make it appear desirable that such payment should be withheld, the decree may direct that such money or other property be paid into the surrogate's court for the benefit of such legatee, distributee, beneficiary of a trust or such person or persons who may thereafter appear to be entitled thereto. Such money or other property so paid into court shall be paid out only by the special order of the surrogate or pursuant to the judgment of a court of competent jurisdiction.

2. In any such proceeding, where it is uncertain that an alien legatee, distributee or beneficiary of a trust, not residing within the United States or its territories, would have the benefit or use or control of the money or other property due him, the burden of proving that such alien legatee, distributee or beneficiary of a trust will receive the benefit or use or control of the money or other property due him shall be upon him or on the person or persons claiming from, through or under him."

28 U. S. C. Section 2281:

"An interlocutory or permanent injunction restraining the enforcement of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge

thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

APPENDIX B.

MEMORANDUM OPINION OF THE DISTRICT COURT.

McLEAN, *D. J.*

Plaintiffs are nationals and residents of Rumania. They bring this action as a class action under Rule 23 on their own behalf and on behalf of all other residents of Rumania "similarly situated." Their complaint seeks a judgment that Section 269-a of the New York Surrogate's Court Act violates the Constitution of the United States. They also ask an injunction restraining five New York Surrogates and the Comptroller of the State of New York from enforcing and applying it. The present motion is for the convening of a three-judge court under 28 U. S. C. § 2281 and for a preliminary injunction.

Section 269-a provides as follows:

> "*Deposit in court for benefit of legatee, distributee or beneficiary.* 1. Where it shall appear that a legatee, distributee or beneficiary of a trust would not have the benefit or use or control of the money or other property due him, or where other special circumstances make it appear desirable that such payment should be withheld, the decree may direct that such money or other property be paid into the surrogate's court for the benefit of such legatee, distributee, beneficiary of a trust or such person or persons who may thereafter appear to be entitled thereto. Such money or other property so paid into court shall be paid out only by the special order of the surrogate or pursuant to the judgment of a court of competent jurisdiction.

2. In any such proceeding, where it is uncertain that an alien legatee, distributee or beneficiary of a trust, not residing within the United States or its territories, would have the benefit or use or control of the money or other property due him, the burden of proving that such alien legatee, distributee or beneficiary of a trust will receive the benefit or use or control of the money or other property due him shall be upon him or on the person or persons claiming from, through or under him." *

The constitutionality of the statute has twice been upheld by the New York courts.

Matter of Braier, 305 N. Y. 148, 691 (1953), *appeal dismissed sub nom. Kalmane v. Green*, 346 U. S. 802 (1953);

In the Matter of Marek, 11 N. Y. 2d 740 (1962), *appeal dismissed sub nom. Ioannou v. New York*, 371 U. S. 30 (1962).

In each case the Supreme Court dismissed the appeal for want of a substantial federal question.

Plaintiffs contend that nevertheless a substantial federal question exists. The complaint alleges that the statute violates due process and that it also conflicts with overriding federal policy.**

Braier clearly disposed of the due process question. To some extent, it dealt with the other question as well.

---

* The first paragraph of this statute was Section 269 prior to April 28, 1960. The section then was renumbered and the second paragraph was added.

** The complaint also says that the statute discriminates against residents of Rumania, thereby denying them equal protection of the laws, and that it "impairs the effective exercise of the power to conduct foreign relations which is constitutionally vested in the Federal Government to the exclusion of the State of New York." In my opinion, these contentions are frivolous. As to the latter, see *Clark v. Allen*, 331 U. S. 503, 516 (1947).

The court held that a federal statute, the Trading with the Enemy Act, had not pre-empted the field. It held further that Section 269-a did not conflict with that federal statute or with a treaty between the United States and Hungary.

Plaintiffs claim that *Braier* is distinguishable, at least as far as Rumanian residents are concerned, by events which have occurred since *Braier* was decided. They point to an agreement between the United States and Rumania concluded on March 30, 1960 which provided that [1960] 2 U. S. T. & O. I. A. 317:

> "The Government of the United States of America will release within 30 days of the date of this Agreement its blocking controls on all Rumanian property in the United States of America."

Pursuant to this agreement, the United States released its "blocking controls" over Rumanian property by deleting reference to Rumania and persons within Rumania from Section 511.101(a) of General License No. 101 (25 Fed. Reg. 3458, April 15, 1960). Rumania was also deleted from 31 C. F. R. § 211.2(a), a regulation which determined that "postal, transportation, or banking facilities in general or local conditions" in various Communist controlled countries "are such that there is not a reasonable assurance that a payee in those areas will actually receive checks or warrants drawn against funds of the United States * * * and be able to negotiate the same for full value."

These amended regulations were in effect at the time of the Surrogate's decision in *In re Greenberg*, 46 Misc. 2d 883, 261 N. Y. S. 2d 176 (Surr. Ct. 1964), *aff'd*, 24 App. Div. 2d 435 (1st Dept. 1965), *leave to appeal denied*, 17 N. Y. 2d 417 (1965). In that case the Surrogate, after taking testimony at a hearing under Section 269-a(2) as to conditions in Rumania, declined to direct a payment of

a legacy to an attorney in fact of a Rumanian legatee. The agreement with Rumania and the federal regulations were not mentioned in his opinion.

The possible conflict between the New York statute and the new federal policy vis-a-vis Rumania as expressed in the 1960 agreement and subsequent federal regulations is a question which has not been set at rest by the decisions cited above. I am inclined to the view that the question is substantial enough to require decision by a federal court. But it seems clear that the question is one of federal "supremacy." Such a question is to be decided by one judge, not three.

Swift & Co. v. Wickham, 382 U. S. 111 (1965).

The motion to convene a three-judge court is therefore denied.

Plaintiffs also request a preliminary injunction, i.e., an order of this Court restraining the New York Surrogates and the New York Comptroller during the pendency of this action from complying with the New York statute. The moving papers make no showing which would justify such relief. There is no showing that these plaintiffs will suffer any irreparable injury before this action can be decided in due course. Therefore, this motion is also denied.

So ordered.

EDWARD C. MCLEAN,
U. S. D. J.

Dated: April 4, 1967.

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-seventh day of September one thousand nine hundred and sixty-seven.

Present:

HON. LEONARD P. MOORE,
HON. J. JOSEPH SMITH,
HON. IRVING R. KAUFMAN, *Circuit Judges.*

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk.

APPENDIX C.

COMPLAINT.

Plaintiffs, complaining of the defendants, allege:

1. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1331, and also under Title 28, United States Code, Section 2281, being a suit in equity to challenge the constitutionality of Section 269-a of the New York Surrogate's Court Act and the policy predicated on the authority of such statute; and to enjoin

the enforcement of the statute on the ground that it violates the rights secured to the plaintiffs and others similarly situated under the Constitution of the United States, and that the Statute infringes upon the exclusive power of the Federal Government over foreign affairs, as hereinafter more fully appears.

2. The Surrogate's Court Act, Section 269-a, provides as follows:

> "Where it shall appear that a legatee, distributee or beneficiary of a trust would not have the benefit or use or control of the money or other property due him, or where other special circumstances make it appear desirable that such payment should be withheld the decree may direct that such money or other property be paid into the surrogate's court for the benefit of such legatee, distributee, beneficiary of a trust, or such person or persons who may thereafter appear to be entitled thereto. Such money or other property so paid into court shall be paid out only by the special order of the surrogate or pursuant to the judgment of a court of competent jurisdiction."
>
> Surrogate's Court Act, Section 269-a(1).

3. Plaintiffs are nationals of Romania, and are residents and domiciled in said state. They bring this action on behalf of themselves and all other residents of Romania, similarly situated with respect to the matters here involved. They are so numerous as to make it impracticable to bring them all before the Court. There being identical or same questions of law and fact, a common relief being sought as will hereinafter more fully appear, plaintiffs brings this action as a class suit, pursuant to Rule 23(a) of the Federal Rules of Civil Procedure:

4. The defendants, Joseph A. Cox, S. Samuel DiFalco, Edward S. Silver, Christopher C. McGrath, John T.

Clancy, are the duly elected, qualified and acting judges of the Surrogate's Courts of New York, Kings, Bronx and Queens Counties, respectively.

5. The defendant, Arthur Levitt, is the duly appointed, qualified and acting Comptroller of the State of New York, and that as such officer he has in his possession and/or under his control, funds belonging to plaintiff, Iuliu Nasta, and other residents of Romania. That he has refused and continues to refuse to honor the claim of and to pay the funds belonging to the plaintiff, Iuliu Nasta, and continues to refuse to honor the claim of any Romanian national, on the basis of the existing policy of the state of New York not to effect payments to residents of certain Eastern European Countries including Romania, and that he refuses to make any payments until such time as those who are entitled to said payment are without the jurisdiction of Romania.

6. That the Surrogates of Bronx and New York counties have ordered the withholding of distribution to the plaintiffs, Anghel Goldstein and Gheorghe Fundi, distributees of the estate of Maurice Siegel, File No. 687 A—1950, and Jerotheos Stavrou, File No. P. 3152—1963, without notice or any opportunity to be heard, and solely because of the existing policy of the State of New York prohibiting the transfer of the funds to residents of Romania. It is the practice of these Surrogate-defendants in the settlement of the final account of an executor or administrator, to withhold the sum payable to a legatee or distributee in Romania and to order it deposited in court pursuant to Section 269-a of the Surrogate's Court Act.

7. The public policy of the State of New York governing the payment of the distributive shares of residents in Romania in decedent's estates, is predicated upon Sec-

tion 269-a of the Surrogate's Court Act, and has been sustained by the Court of Appeals of New York in the Matter of Greenberg, motion for leave to appeal denied, December 30, 1965, 17 N. Y. 2d, 417, 46 Misc. 2d, 383, 24 App. Div. Rep. 2d, 435.

8. On February 19, 1951, the United States Treasury Department, pursuant to the authority vested in it by P. L. No. 828, Section 5, 54 Stat. 1036, 31 U. S. C. A., Section 123, issued Treasury Circular 655, listing twelve countries, including Romania, to which the forwarding of public funds, such as social security benefits and veteran's pensions, was prohibited. The Treasury Department concluded, therefore, that with respect to checks or warrants drawn against funds of the United States in favor of a Romanian national, local conditions in Romania were such that there was not a reasonable assurance that a payee in that country would actually receive payment or be able to negotiate the check or warrant for full value, Title 31, Section 211.3(a).

9. On March 30, 1960, an agreement relating to financial questions was concluded at Washington, D. C. between the governments of the United States and of Romania. By virtue thereof, Romania was removed from the proscribed list of the United States Treasury Department of countries to which federal funds may not be transmitted, and, furthermore, all federal regulations of a blocking nature regarding Romanian nationals were removed, 31 C. F. R. Section 211.2 (a), 25 Federal Regulations, pages 3456, 3526. The present official policy of the United States regarding payment of funds to persons resident in Romania, is set forth in the United States Treasury Regulation 655, as amended in April 1960, and now declares that there is a reasonable assurance that a payee in that

area will actually receive checks or warrants drawn against funds of the United States, and will be able to negotiate them for full value. That ever since April of 1960, the United States has been remitting checks and warrants representing social security benefits, veterans pensions and other public funds to residents in Romania without any problem or difficulty as to the receipt, and use and control thereof by the recipient.

10. The policy of the State of New York, as applied to the residents of Romania, as hereinabove set forth, encroaches upon and impairs the effective exercise of the power to conduct foreign relations which is constitutionally vested in the Federal Government to the exclusion of the State of New York.

11. The authoritative conclusion by The Treasury Department of the United States that a reasonable assurance exists that a payee in Romania will actually receive the funds remitted to him and will be able to negotiate checks or warrants for full value, and the consequent transfer of public funds to residents in Romania since April of 1960, constitutes official Federal policy, and therefore, the policy of the State of New York in withholding distribution to heirs, legatees or beneficiaries in Romania is in direct conflict with and in violation of, and must give way to overriding federal policy.

12. That Section 269-a of the Surrogate's Court Act of New York, as applied by these defendants to the rights of these plaintiffs and other residents of Romania, deprives them arbitrarily of their distributive shares, and constitutes an unconstitutional governmental interference without due process of law in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States.

13. Defendants have established and are maintaining a policy and practice of denying residents of Romania their distributive shares, otherwise secured to them, solely, because of their place of residence, and that such practice unlawfully discriminates against the plaintiffs and others similarly situated of the equal protection of the laws guaranteed them by the Fourteenth Amendment insofar as the statute is applied only because of their place of residence.

14. That the defendants Surrogates and others have been withholding the distributive shares belonging to residents of Romania, pursuant to the aforementioned public policy of New York, for more than fifteen years, and the amount being withheld is in excess of one half million dollars.

15. Many of the plaintiffs and others similarly situated are in dire need and/or aged and desperately in need of these funds. A delay in ascertaining and determining the rights of the plaintiffs, and others similarly situated and affected, on whose behalf this suit is brought, will result in further denial and deprivation of their rights in the indefinite future by reason of the acts herein complained of. There is no other remedy afforded by law or statute against the illegal acts and conduct of the defendants, save the equity powers of this Court, and unless the relief prayed for is granted.

WHEREFORE, plaintiffs pray that a three judge court be convened, pursuant to Title 28 U. S. C., Section 2281, and for the following relief:

1. That this Court enter a judgment or decree declaring that the policy and practice of the defendants in denying these plaintiffs and others similarly situated the right to their distributive shares from decedent's estates and to other funds to which they are entitled on account of

their residence in Romania is a denial of the rights secured to them by the Fifth and Fourteenth Amendments to the United States Constitution and, therefore, unconstitutional and void.

2. That Section 269-a of the Surrogate's Act of New York, as applied by the defendants to the rights of these plaintiffs and others similarly affected, be declared unconstitutional.

3. That this Court issue a permanent injunction forever restraining and enjoining the defendants and each of them, their agents and employees, from denying plaintiffs, and others similarly situated the right to their distributive shares from decedents' estates, and to other funds to which they may be entitled; that the defendants, and each of them, their agents, and employees, be ordered and directed to take such action as shall be necessary to deliver the distributive shares and other funds which are due and owing to and being withheld from these plaintiffs and others similarly situated.

4. That pending the final hearing and determination of this complaint upon its merits, the Court issue a preliminary injunction, restraining the defendants and each of them, their agents, and employees, from denying the plaintiffs, and others similarly situated, the right to their distributive shares and other funds to which they may be entitled.

5. For such other and further relief which this Court may deem proper.

SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
DEC 6 1967
JOHN F. DAVIS, CLERK

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JOHN T. CLANCY, Surrogate of the County of Queens,

ARTHUR LEVITT, State Comptroller,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Statement of the Case

Petitioners seek a writ of certiorari to review a judgment of the Court of Appeals for the Second Circuit entered in this case on September 27, 1967. The judgment affirmed

an order of the United States District Court of New York, dated April 4, 1967, which denied petitioners' motion to convene a three-judge court (Appendix B to Petition, pp. 9-13).

Opinions Below

The unreported memorandum opinion of the District Court is printed in petitioners' Appendix B (pp. 9-12). The Court of Appeals affirmed without opinion.

Jurisdiction

Petitioner invokes this Court's jurisdiction under 28 U.S.C., § 1254 (1).

Questions Presented

Whether the constitutional claims set forth in petitioners complaint are substantial; and whether, despite this Court's decision in *Swift & Co.* v. *Wickham*, 382 U. S. 111 (1965), the petitioners' claims require determination by a three-judge court.

Statute Involved

The statutory provisions involved are New York Surrogate's Court Act, § 269-a and 28 U.S.C., § 2281. They are printed in Appendix A to the Petition (pp. 8-9).

The Complaint

The complaint is printed in full (Appendix C, pp. 13-19). It alleges that the plaintiffs are all nationals and residents of Romania, who bring a class suit to challenge the constitutionality and enjoin the enforcement of New York Surrogate's Court Act on the ground that the statute

"violates" their federal constitutional rights and "infringes upon the exclusive power of the Federal Government over foreign affairs" (Pars. 1-3). It is further alleged that, pursuant to the statute, the New York State Comptroller is withholding certain funds, despite claims for payment and that certain Judges of the Surrogate's Court of the State of New York have ordered the withholding of distribution of other funds (Pars. 4-5).

The complaint further alleges that in 1951, the United States Treasury Department issued Treasury Circular 655, listing twelve countries, to which the forwarding of *public funds*, such as social security benefits and veteran's pensions, was prohibited (Par. 8). It also alleged that in 1969, by virtue of an agreement relating to "financial questions", Romania was removed from the proscribed list of countries to which *federal funds* might not be transferred (Par. 9). It alleges that the federal government, pursuant to *its change of official policy*, has been remitting checks and warrants representing "social security benefits, veterans' pensions and other public funds to residents in Romania (Par. 9).

The complaint also alleges: New York's "policy" as applied to Romanian residents encroaches upon and impair the federal government's power to conduct foreign relations; the *federal* conclusion that Romanian residents will receive *federal* funds constitutes official federal policy, with which New York's policy to withhold distribution of New York estates to "heirs, legatees or beneficiaries in Romania is in direct conflict"; and that, as applied to the rights of the plaintiffs and other Romanian residents, New York Surrogate's Court Act, § 269-a "deprives them arbitrarily of their distributive shares, without due process of law, in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States" (Pars. 10, 11 and 12).

New York's policy is, in addition, alleged to deprive Romanian residents of the equal protection of the laws

under the Fourteenth Amendment, solely because of their residence (Par. 13). Finally, the complaint alleges distributive shares have been withheld for more than fifteen years, in an amount exceeding one-half million dollars; and that many of the plaintiffs and others are in dire need and/or aged (Pars. 14 and 15).

The convening of a three-judge Court was requested, as well as a judgment declaring New York's policy and practice to be "violative of plaintiffs" Fifth and Fourteenth Amendment rights; declaring S.C.A., § 269-a, unconstitutional, as applied to plaintiffs; and enjoining the defendants from withholding funds from plaintiffs and others similarly situated.

ARGUMENT

The petition for certiorari should be denied. The Court of Appeals correctly sustained the holding of the District Court that a question of federal supremacy was presented by plaintiffs' allegation that there was a direct conflict between New York Surrogate's Court Act, § 269-a and the federal policy expressed in a 1960 agreement between Romania and the United States State Department. Since the complaint presented a supremacy question, it would have been incorrect to convene a three-judge court. *Swift & Co.* v. *Wickham*, 382 U. S. 111.

The only novel federal question which the plaintiffs assert by their complaint is predicated upon an alleged conflict of the provisions of the New York statute with the terms of a 1960 financial agreement made between Romania and the United States (Appendix D, *infra*), by the terms of which the Treasury removed restrictions which it had imposed in 1951 with respect to the transmission of federal funds to Romania.

Briefly, it was the petitioners' position in the Court of Appeals that, upon the execution of the 1960 agreement, a "direct conflict" arose between the terms of Surrogate's Court Act, § 269-a and the "superior federal policy based upon the Financial Agreement of March 30, 1960, between our government and that of Romania" (Court of Appeals, App. Br., p. 6). Our answer was that there is no "conflict" between the New York statute and 1960 agreement; and that the asserted supremacy of the 1960 agreement, in any event, brought the alleged constitutional question within the ambit of the decision in *Swift & Co.* v. *Wickham*, 382 U. S. 111, upon the basis of which the District Court had declined correctly to convene a three-judge court.

(1)

In *Swift & Co.* v. *Wickham, supra*, it was held to be improper for a District Court to convene a three-judge court when the basis of the attack upon the unconstitutionality of a state statute was its alleged conflict with the provisions of a federal *statute*. The reasoning of this Court, precluding the convening of a three-judge court when the Supremacy Clause of the United States Constitution is invoked, is equally applicable to a supremacy situation where the alleged conflict of the state statute is with the provisions of a federal *treaty*.

In *Swift*, the majority opinion by Mr. Justice HARLAN, stated (382 U. S., at p. 122):

> "The upshot of these decisions seems abundantly clear: Supremacy Clause cases are not within the purview of § 2281."

A footnote to this ruling, analyzing the prior cases, explained (footnote 18, pp. 122-123):

> "None of these cases can be read to suggest that the result depends on whether or not the complaint specifically invokes the Supremacy Clause, for that clause

is the inevitable underpinning for the striking down of a state enactment which is inconsistent with federal law. See the quotation from *Bransford, supra,* p. 121, a case in which the Supremacy Clause was not invoked in the complaint. See also the discussion of *Ex parte Buder, supra,* pp. 220-221. Nor do any of these cases suggest that the issue turns on the amount of statutory construction involved, whether large, small, or simply of the character that entails laying the alleged conflicting statutes side by side."*

Mr. Justice HARLAN buttressed the reasoning of the majority with "important considerations of judicial administration" which included not only the dislocation of the normal structure and functioning of the lower federal courts, but also the expansion of the Supreme Court's obligatory jurisdiction to grant direct review of District Court judgments (pp. 128-129). These considerations (previously delineated by Mr. Justice Frankfurter in *Florida Lime & Avocado Growers, Inc.* v. *Jacobsen,* 362 U. S. 73, 92-93), apply equally to situations, such as the instant one, where the basis for invoking the Supremacy Clause is an alleged conflict between a state statute and a federal "treaty". The Supremacy Clause (Article VI, cl. 2) places "Laws of the United States" and "Treaties made • • • under the Authority of the United States" in correlative positions. Each is stated to be "the Supreme Law of the Land". *Swift & Co.* v. *Wickham, supra,* p. 126, footnote 24.

U. S. v. *Georgia Pub. Serv. Com'n,* 371 U. S. 285 (1963), cited by petitioners (p. 6) does not, upon examination, aid them. In that case, the United States government had itself sued in a federal court to enjoin a state public

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* Here, the question presented is inevitably one of comparing S.C.A., § 269-a, with the terms of the 1960 agreement. The basic question is not one of "interpretation of the Federal Constitution" (382 U. S., at p. 120).

service commission from prohibiting common carriers from contracting with agencies of the federal government for the mass transportation within the State of Georgia of the household goods of civilian employees of the federal government, at rates other than those prescribed by the Georgia Commission. The case did not simply present an isolated issue of conflict between state and federal statutes; or that of a specific treaty. It presented a contention that the Georgia regulatory scheme was unconstitutional "because it burdened the exercise by the United States of its power to maintain a civilian service and to carry out other constitutional functions" (371 U. S., at p. 287). Moreover, the District Court had there convened the three-judge court; and as Mr. Justice DOUGLAS observed for the majority (371 U. S., at pp. 287-288):

> "Once convened the case can be disposed of below or here on any ground, whether or not it would have justified the calling of a three-judge court."

The *Swift* case indicates a different approach. It vacated a judgment where it deemed the convening of a three-judge court to have been improper. A similar view has also been adopted earlier this year by Mr. Justice DOUGLAS (for a unanimous Court) in *Moody* v. *Flowers*, and *Suffolk County* v. *Bianchi*, both 387 U. S. 97 (1967), cited by the petitioners in the Court of Appeals (App. Br., pp. 9-10). Judgments in both cases, predicated on "equal protection" grounds in local reapportionment cases, were vacated for failure to comply with a different requirement that exists for the convening of a three-judge court—that the statutes challenged be of "general and statewide application."

(2)

No substantial federal question is presented herein. This case concededly deals with the estates of New York decedents. State control and jurisdiction over the distribution of the estates of its decedents was recognized in *Irving*

Trust v. *Day,* 314 U. S. 556 (1942), where Mr. Justice JACKSON wrote (p. 562):

> "Nothing in the Federal Constitution forbids the legislature of a state to limit, condition, or even abolish the power of testamentary disposition over property within its jurisdiction. *Mager* v. *Grima,* 8 How. 490; *United States* v. *Fox,* 94 U. S. 315; *United States* v. *Perkins,* 163 U. S. 625; cf. *Randall* v. *Kreiger,* 23 Wall. 137, 148."

See also *Clark* v. *Allen,* 331 U. S. 503, 517 (1947).

Surrogate's Court Act, § 269-a (formerly § 269), whose application petitioners question, merely provides for the payment into court of money or property, for the benefit of a legatee, distributee or beneficiary of a trust, or such persons as may thereafter appear to be entitled thereto, of money or property due him, where "it shall appear that such legatee, distributee or beneficiary" would not have the benefit or use or control of the money or other property due him, or where other special circumstances make it desirable that such payment should be withheld (L. 1939, ch. 343).

Section 269 was enacted at the request of the Executive Committee of the New York State Surrogates' Association. Its purpose was to authorize the deposit of monies or property in the Surrogate's Court where transmission to a beneficiary, legatee, or other person resident in a foreign country might be circumvented by confiscation in whole or in part. The section was designed to authorize the impounding of the fund by the Surrogate to await the time when payment could be made "to the beneficiary for his own benefit, use and control" (Gilbert-Bliss, Civil Practice Act of New York, Vol. 13 B, p. 155, recompiled 1952).

In 1960, the section was amended by adding to it a second subdivision, placing upon any non-resident "alien legatee, distributee or beneficiary of a trust", the burden

of proving, in any proceeding to obtain the money, that he would have the benefit or use or control of the money or other property due him. The provisions of the subdivision relating to such burden of proof were expressly made applicable to any person "claiming from, through or under" such non-resident alien (L. 1960, ch. 975).

Section 269 is not an escheat statute. Accordingly, *Kolovrot* v. *Oregon*, 366 U. S. 187 (1960), which the petitioners cite (p. 7) has no bearing. In *Kolovrot*, the Court merely held that Oregon could not, in the face of a United States treaty with Yugoslavia, entitling citizens and residents of Yugoslavia to inherit personal property from their American relatives, under an Oregon statute, declare an escheat and *prevent residents and citizens of Yugoslavia from inheriting the property of two Oregon residents.*

Section 269 is not alleged to be in conflict with any *treaty* made by the United States. It is merely alleged to be in conflict with the "overriding federal policy" set forth in the 1960 agreement concerning "financial questions" (A-17).

The alleged agreement, dated March 30, 1960, referred to in the complaint (Par. 9), merely (a) removed federal regulations of a *blocking* nature which *prohibited* the transmission of funds to Romania and (b) agreed to revise a Treasury regulation in order to permit the transmission of *federal* funds to Romania nationals. It did not purport to remove from any of the States their power or jurisdiction over the devolution of decedent's estates.

In *Matter of Braier*, 305 N. Y. 148 (1953), app. dism. *sub nom. Kalmane* v. *Green*, 346 U. S. 802 (1953), the constitutionality of Surr. Ct. Act § 269-a (formerly § 269) was sustained. The section has been construed to *protect*, not to impair, the rights of non-resident alien legatees or distributees.

In *Matter of Marek*, 11 N. Y. 2d 740 (1962), app. dism. 371 U. S. 30 (1962), a further effort to have Surr. Ct. Act § 269-a, declared unconstitutional met with failure. Mr. Justice Douglas, in a formal opinion (371 U. S. 30-34) dissented and indicated that he would have noted jurisdiction in order to have the Supreme Court pass upon the question of whether the New York statute constituted an impairment of the "effective exercise of the Nation's foreign policy" (p. 32). The majority of the Court, in the usual form of *per curiam* opinion, voted (*after the* 1960 agreement) to dismiss the appeal (p. 30):

"for want of a substantial federal question."

(3)

The utter lack of merit of the petitioners' application is further demonstrated by the fact that, in appropriate cases, where the New York courts have found that alien beneficiaries or distributees might be able to enjoy the beneficial use of their legacies or distributive shares, the New York Surrogates have permitted transmission of such legacies or shares. See *Matter of Saniuk*, 21 A. D. 2d 922 (3rd Dept., 1964), leave den. 15 N. Y. 2d 482 (1964); *Matter of Siegler*, 25 A. D. 2d 805 (3rd Dept., 1966); and *Matter of Krasowski* (3rd Dept., Oct. 27, 1967), reported unofficially 158 N.Y.L.J., No. 90, Nov. 9, 1967, front page; where New York Surrogate's Courts directed payments to be made to Soviet distributees and Hungarian and Polish beneficiaries, respectively. Compare *Matter of Droganoff*, 43 Misc. 2d 233 (Surr. Ct., Westchester Co., 1964), where it was held that, even after an "Iron Curtain" country had been removed from listing under Treasury Department Circular No. 655, it was still the duty of a New York Surrogate to make his own independent determination, based upon a compliance with the statutory requirement that a petitioner meet his burden of proof, that Bulgarian legatees or distributees would receive the benefit, use or control of funds from a New York decedent's

estate. The evidence in the *Droganoff* case, consisting of news releases, a New York State Insurance Department letter and two purported judicial determinations, was held to be insufficient. See also *Matter of Polubatko*, 21 A. D. 2d 735 (4th Dept., 1964), where the evidence was held to be insufficient to warrant the transfer of funds to Latvian distributees.

The 1963 article by Prof. William L. Boyd, cited by petitioners (p. 7) recognizes that statutes like Surrogate's Court Act, § 269-a (the category he describes as "eastern statutes") are designed "to preserve rather than confiscate the distributees' shares" (51 Georgetown Law Journal 470, at p. 487). Professor Boyd goes further and states (p. 487):

> "The classification set forth in this statute is reasonable and does not constitute a violation of the equal protection clause to the extent that the statute seeks to effectuate the decedent's intent that his beneficiaries should have the benefit of their estate shares."

Further, Professor Boyd concludes (op. cit., p. 513):

> "The Treasury regulation should not be relied on as a statement of federal policy with respect to the distribution of shares in decedent's estates. The standard State Department response is so ambiguous that it does not reveal a federal policy."

To date, the federal government has not seen fit to promulgate any regulation or to announce any policy dealing with the distribution of estate shares. Absent such an announcement, the federal courts need not now confront the problem of determining what significance such an announcement would have. Nor need this Court or a three-judge court undertake the review of the decision in *Clark* v. *Allen*, 331 U. S. 503 (1947), which Professor Boyd has suggested (op. cit., p. 515).

(4)

Since the New York cases (cited by us in subdivision 3, *supra*) indicate that in each case a separate exercise of discretion by the Surrogate is warranted in the application of Surr. Ct. Act, § 269-a, the petitioners have no standing to petition in this Court on behalf of persons "similarly situated" (Complaint, A-14, 19).

Conclusion

(1)

As noted by the District Court (A-10), the constitutionality of Surrogate's Court Act, § 269-a has twice been upheld by the New York courts and this Court has in each case dismissed "for want of a substantial federal question." *Matter of Braier*, 305 N. Y. 148, 691 (1953), appeal dismissed *sub nom. Kalmane* v. *Green*, 346 U. S. 802 (1953); *Matter of Marek*, 11 N. Y. 2d 740 (1962), appeal dismissed *sub nom. Ioannou* v. *New York*, 371 U. S. 30 (1962). These cases appear to have disposed of any due process question.

Moreover, as the District Court noted (A-10), the petitioners' deprivation of "equal protection" claim and the contention that the statute "impairs the effective exercise of the power to conduct foreign relations which is constitutionally vested in the Federal Government to the exclusion of the State of New York" are *frivolous*. *Clark* v. *Allen*, 331 U. S. 503, 516 (1947).

(2)

Only the "possible conflict" between the New York statute and the federal policy vis-a-vis Romania, as expressed in the 1960 agreement and subsequent federal regulations, had not specifically been set at rest by the decisions cited in the two preceding paragraphs.

But that question, as the District Court noted (A-12), is one of federal "supremacy". By reason of the nature of the question, whether it be regarded as "substantial", as it was by the District Court, or insubstantial, as we contend, the Courts below have properly held that it should be decided by one District Court judge, rather than by a three-judge court. *Swift & Co.*, 382 U. S. 111 (1965).

The petition for a Writ of Certiorari should be denied.

Dated: New York, New York, December 1st, 1967.

Respectfully submitted,

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APPENDIX D

Excerpt From March 30, 1960 Agreement Dealing With Treasury Department Circular 655 (Italics supplied)

"I have the honor to refer to the recent discussions between representatives of the Government of the Rumanian People's Republic and the Government of the United States of America regarding the restriction contained in the regulation of the Government of the United States of America known as Treasury Department Circular 655 concerning the transfer of money from *United States public funds* to payees in Rumania.

"In this connection I wish to inform you that:

(a) The Government of the Rumanian People's Republic places no obstacles or limitations preventing recipients of allowances, social security payments, military pension and other payments by the United States authorities, from holding checks for such payments in accordance with existing regulations of the Rumanian People's Republic and from converting them at the most favorable prevailing rate for remittances to private persons, at present 6 lei to the dollar plus 6 lei representing an exchange premium of 100%.

(b) The Government of the Rumanian People's Republic places no obstacles in the way of beneficiaries in Rumania who may have various claims against United States remitting agencies (such as the Social Security Administration, the Veterans Administration, and any other agencies concerned) furnishing such agencies such information and documentation as may be required by United States law in

connection with these claims and communicating directly or indirectly with respect to these matters with the American authorities concerned.

"In accordance with the understanding we have reached, I will appreciate receiving your confirmation that the Government of the United States of America, taking into account the above assurances, agrees to remove the restrictions contained in Treasury Department Circular 655.

"Accept, Excellency, the assurances of my highest consideration."

I hereby confirm that, in view of the assurances contained in your letter, the Government of the United States of America will amend Circular No. 655 issued by the Secretary of the Treasury of the United States of America, so as to remove the restriction on the transfer of money from *United States public funds* to payees in Rumania.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

GOLDSTEIN *v.* COX ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 825. Decided January 15, 1968.

PER CURIAM.

The petition for a writ of certiorari is granted and the judgment is vacated. The case is remanded to the United States Court of Appeals for the Second Circuit for further consideration in light of *Zschernig* v. *Miller*, No. 21, October Term, 1967, decided this date.